BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DONNIE RAY OLIVER	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,012,285
ATCHISON CASTING CORPORATION	)	
Respondent	)	
AND	)	
	)	
PACIFIC EMPLOYERS INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) request review of the October 5, 2004 preliminary hearing Order entered by Administrative Law Judge (ALJ) Bryce D. Benedict.

ISSUES

Following the September 29, 2004 preliminary hearing, Judge Benedict awarded claimant preliminary benefits including authorized medical treatment with Dr. Dalenberg. The ALJ's Order makes a specific finding "that there was an aggravation or acceleration of preexisting disc disease."[1]

Respondent argues that claimant has failed to prove that his back complaints are attributable to his work activities with respondent. Instead, respondent points to claimant's personal health conditions as the probable cause of his low back condition and need for surgery.

Conversely, claimant argues that his work activities either caused or aggravated his low back condition and, therefore, the ALJ's Order should be affirmed.

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[1] Order (Oct. 5, 2004).

Accordingly, the sole issue for the Board's review is whether claimant has proven personal injury by accident arising out of and in the course of his employment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Workers Compensation Act places the burden of proof upon claimant to establish his right to an award of compensation and to prove the conditions on which that right depends.[2] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[3]

An injury arises out of employment if it arises out of the nature, conditions, obligations, and incidents of the employment.[4] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[5]

Claimant had a preexisting degenerative condition of his lumbar spine as well as certain other personal medical problems that are unrelated to the series of work-related accidents alleged in this case. It is well settled in this State that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.[6] "The test is not whether the job-related activity or injury caused the condition but whether the job related activity or injury aggravated or accelerated the condition."[7]

Claimant is 59 years old. He has worked for respondent for several years. Claimant alleges injuries to his "[b]ack, legs and all other affected body parts" from "[p]erforming normal duties while assigned to the core room" beginning "[o]n or about December 1, 2002

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[2] K.S.A. 44-510(a); *See also Chandler v. Central Oil Corp.,* 253 Kan. 50, 853 P. 2d 649 (1993); *Box v. Cessna Aircraft Co.,* 236 Kan. 237, 689 P.2d 871 (1984).

[3] K.S.A. 44-508(g); *See also in re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[4] *Brobst v. Brighton Place North*, 24 Kan. App. 2d 766, 771, 955 P.2d 1315 (1997).

[5] *Springston v. IML Freight, Inc.*, 10 Kan. App. 2d 501, 704 P.2d 394, *rev. denied* 238 Kan. 878 (1985).

[6] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.,* 219 Kan. 196, 547 P.2d 751 (1976); *Harris v. Cessna Aircraft Co.,* 9 Kan. App. 2d 334, 678 P.2d 178 (1984).

[7] *Hanson v. Logan U.S.D. 326,* 28 Kan. App. 2d 92, 11 P.3d 1184, *rev. denied* 270 Kan. 898 (2001); *Woodward v. Beech Aircraft Corp.,* 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).

and each and every day worked thereafter."[8] During the preliminary hearing and in claimant's brief, February 26, 2003 was stated to be the ending date for this series of accidents.[9]

During the preliminary hearing claimant testified that in February of 2003 he was performing the job of clean-up in the core room. Claimant described this job as requiring heavy lifting and forceful pushing and pulling with a pry bar. In the course of performing this heavy work claimant began noticing his back hurting with the pain going down his right leg to his foot. He also described having numbness and tingling in his foot. Claimant denied having these symptoms before being transferred to the core room clean-up job in 2003.

Claimant first sought medical treatment with Dr. Growney on February 27, 2003, and was taken off work. After having an MRI claimant was referred by Dr. Growney to Dr. Dalenberg, who recommended surgery. Claimant seeks to have that surgery authorized. The medical opinions on causation, however, are contradictory.

Claimant related the onset of his symptoms to his heavy manual labor and lifting at work in February 2003. Claimant testified reporting his back injury to several co-workers and supervisory personnel and describing his injury as work related in February 2003. Respondent disputes this, but presented no witness testimony to contradict claimant's testimony. It appears that the ALJ found claimant's testimony credible. Under the circumstances, where the medical evidence is in conflict, claimant's testimony should be given more weight. Claimant denied having back complaints before beginning the core room clean-up job in 2003. The onset of claimant's symptoms corresponded with the increase in the heavy nature of claimant's work, specifically the addition of heavy lifting.

The Board finds that it is more probably true than not true that claimant's job activities aggravated and accelerated his degenerative low back condition. Based on the record compiled to date, claimant has met his burden of proving that he has suffered repetitive use injuries to his low back that arose out of and in the course of his employment with respondent.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Bryce D. Bendict dated October 5, 2004, is affirmed.

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[8] K-WC E-1 Application for Hearing (filed Aug. 15, 2003).

[9] P.H. Trans. at 7; Claimant's Brief in Support of the Preliminary Hearing Order of October 5, 2004, at 4 (filed Nov. 15, 2004). Claimant's brief states the last worked as February 26, 2004. The preliminary hearing transcript reflects the last day worked as February 26, 2003. Dr. Dalenberg's (P.H. Trans. at Ex. 3) chart notes reflect the onset of symptoms late February, 2003, after two to three days of heavy lifting and pushing at work. Insofar as claimant's testimony and the doctor's notes reflect claimant's onset of symptoms as February, 2003, the Board assumes the 2004 date in claimant's brief is a typographical error.

IT IS SO ORDERED.

Dated this ____ day of March 2005.

BOARD MEMBER

c: Mark S. Gunnison, Attorney for Claimant
John B. Rathmel, Attorney for Respondent and Pacific Employers Insurance Co.
Bryce D. Benedict, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director